In the Court of Appeal of Alberta

Citation: McCauley Community League v Edmonton (City), 2012 ABCA 86

Date: 20120313
Docket: 1103-0136-AC
Registry: Edmonton

Between:

McCauley Community League

Appellant
(Applicant)

- and -

The City of Edmonton, The Subdivision and Development Appeal Board of the City of Edmonton and Niginan Housing Ventures

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice June Ross

Reasons for Judgment Reserved of The Honourable Mr. Justice Slatter
Concurred in by The Honourable Mr. Justice McDonald
Concurred in by The Honourable Madam Justice Ross

Appeal from the Decision of the
Subdivision and Development Appeal Board of the City of Edmonton
Dated the 21st day of April, 2011

Reasons of Judgment Reserved
of The Honourable Mr. Justice Slatter

[1] The appellant Community League attempted to appeal a development permit given to the respondent Niginan Housing Ventures. The respondent Subdivision and Development Appeal Board dismissed the appeal on the basis that it had not been filed within 14 days, as required by s. 686(1) of the *Municipal Government Act*, RSA 2000, c. M-26. The Board also concluded that it did not have jurisdiction to decide if the development permit had expired. The appellant was granted leave to appeal further to this Court: ***McCauley Community League v Edmonton (City)***, 2011 ABCA 327.

Facts

[2] Niginan Housing Ventures owns land that is zoned under the City of Edmonton *Zoning Bylaw 12800* as RA8 Medium Rise Apartment Zone. This zone allows Apartment Housing, but it does not allow Extended Medical Treatment Services as either a permitted or a discretionary use.

[3] Niginan Housing Ventures plans to construct Ambrose Place, a 42 unit building that will provide housing and support services for hard-to-house individuals and couples. Twenty-eight units will be supported housing; 14 units will be unsupported, affordable housing units. The services provided will include 24 hours per day staffing, seven days per week, with one staff member being a licensed practical nurse. Two meals per day will be provided to the residents, and assistance will be given for preparation of the third meal. An outreach worker will be available, there is a secure depository for medications, and medical practitioners will provide on-site medical services from time to time.

[4] Niginan Housing Ventures applied for and received a development permit for its facility on May 5, 2008. The City has two classifications of development permits. Permits for Class A Permitted Developments are granted where the development is a permitted use and complies in all respects with the regulations of the Bylaw. Where the development is a discretionary use, or requires a variance from the Bylaw, the City will issue a Class B Discretionary Developments permit. Since Extended Medical Treatment Services is neither a permitted nor a discretionary use, the development officer must have concluded that the facility was permitted Apartment Housing, it required no variations, and therefore the development permit issued was a Class A permit.

[5] Section 20.1 of the Bylaw provides that: "Within seven days of the issuance of a Development Permit for Class B Development, the Development Officer shall dispatch a notice by ordinary mail to . . ." a number of listed interested parties, including the local community league. Section 686(1)(b) of the *Act* provides a right to appeal within 14 days ". . . after the date on which the notice of the issuance of the permit was given in accordance with the land use bylaw." The Bylaw does not provide that notice be given of the issuance of Class A permits. Since they are only given for permitted uses where no variance is required, there is usually nothing to appeal, and hence no need to give notice to start the time period running. Since the development officer had treated the Niginan Housing Ventures permit as a Class A permit, no notice was given to anyone.

[6] Section 22.1 of the Bylaw provides that a development permit "shall no longer be valid after one year from the date of approval of the permit". In order for the development permit to remain valid, either a building permit must be issued within one year, or some construction must have been started. A foundation permit was not issued to Niginan Housing Ventures until December 2, 2010, and there was no construction until about November of 2010. While on the face of it the development permit appeared to have expired on May 5, 2009, the City eventually took the position that the one year time limit did not begin to run until all of the conditions in the development permit had been complied with.

[7] The appellant Community League was aware that some development was planned for the lands, but had not received any communications with respect thereto for some time. Its president noticed some construction activity on the site in November of 2010, and inquiries were made. At first there was some confusion as to whether the development permit had been issued, or was still current. On December 5, 2010, the appellant wrote to the Planning and Development Department expressing opposition to the development. The letter asserted that the facility was not a permitted use, because it was an Extended Medical Treatment Service development, and asked that the foundation permit be revoked. The letter was written on the assumption that the development permit had expired, because it stated that the appellant wanted notice "if the Planning Department chooses to re-issue a Development Permit".

[8] On January 7, 2011 the Planning and Development Department replied in writing, confirming that a development permit had been issued. The letter took the position that the facility was Apartment Housing, it was therefore a permitted use, and the permit was accordingly a Class A permit. The letter also took the view that the permit had not expired, because the one year time limit did not start to run until the conditions in the permit were fulfilled in February of 2010. The appellant filed an appeal to the Board on January 17, 2011.

The Subdivision and Development Appeal Board

[9] The appellant appealed the development permit on the basis that the facility was not Apartment Housing, but was properly characterized as Extended Medical Treatment Services. However, before that issue could be addressed, two preliminary issues arose. Firstly, the appellant argued that the development permit had expired. It argued that the one year period ran, on the plain wording of the Bylaw, from "approval of the permit", not from "fulfillment of the conditions".

[10] The second preliminary issue was raised by the respondents. They argued that the appeal was not commenced within 14 days, as required by the *Act*. They argued that the appellant had constructive notice of the development permit in November when it observed construction activity on the site. Thus, the appeal was out of time.

[11] After an adjournment of the hearing, the Board obtained a legal opinion which was not disclosed to the parties, and which was possibly relied on by the Board in reaching its decision.

[12] The Board concluded that it did not have jurisdiction to decide if the development permit had expired. The grounds for appeal in the *Act* that engage the jurisdiction of the Board are:

> 685(1) If a development authority
>
> (a) fails or refuses to issue a development permit to a person,
>
> (b) issues a development permit subject to conditions, or
>
> (c) issues an order under section 645,
>
> the person applying for the permit or affected by the order under section 645 may appeal to the subdivision and development appeal board.
>
> (2) In addition to an applicant under subsection (1), any person affected by an order, decision or development permit made or issued by a development authority may appeal to the subdivision and development appeal board.

The Board decided that the City's assertion that the development permit had not expired was not "an order, decision or development permit" within s. 685(2).

[13] The Board concluded that the reference to a "decision" in s. 685(2) only included decisions made on applications for development permits. The letter of January 7, 2011 from the Planning and Development Department relating to the possible expiry of the development permit was not in relation to the approval of a development permit.

[14] The Board also referred to s. 617, which summarizes the purposes of Part 17 of the *Act*. It provides that the purposes of Part 17 are:

> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
>
> (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,
>
> without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

With respect to this provision, the Board concluded at para. 3:

> In consideration of Section 617 of the Act, it is difficult for the Board to accept that Mr. Price's letter [of January 7, 2011] can be a decision that can be appealed to the

> Subdivision and Development Appeal Board. While the revocation of a permit gives the proponent the right to appeal, an affected party appealing the position of the City of Edmonton with respect to whether or not the permit has expired would likely infringe on the rights of the proponent for the specific interests of the Community League. In this regard, the Board is of the opinion that such a decision cannot be grounds for appeal as it appears to be contrary to the purpose section of Part 17 of the *Municipal Government Act*.

The Board therefore declined to consider on the merits whether the development permit had in fact expired.

[15] The Board next turned to consider whether the appeal had been filed in time. The Board noted that affected parties are not provided with notice of Class A development permits. The Board concluded, however, that the appellant had notice more than 14 days before the appeal was filed. This notice was found to arise from the fact that construction activity was observed on the site, the appellant was aware that some development was anticipated for the site, the letter of December 5, 2010 made reference to a development permit application number, and the development officer had spoken with a representative of the appellant in November of 2010 and advised that a development permit had been issued. The Board concluded ". . . it would be rational and based on reason for [the appellant's president] Mr. Stack to deduce that the November 22, 2010 construction activity had a very credible likelihood to be the Niginan development". The Board rejected the argument that actual notice did not occur until the appellant had an opportunity to review the development permit application plans. It concluded that notice was provided, at the latest, on November 22, 2010.

[16] Since the Board concluded that the appeal had not been filed in time, it did not consider whether the development was Apartment Housing or Extended Medical Treatment Services.

Issues and Standard of Review

[17] The appellant was granted leave to appeal on whether the Board erred in four respects:

(a) in concluding it did not have jurisdiction to consider the issue of the development permit's expiry date;

(b) in finding the appellant was out of time to appeal;

(c) in failing to consider whether the proposed use of the building is Apartment Housing or Extended Medical Treatment Services, and then failing to consider whether the proposed use is a permitted or discretionary use in the RA8 Medium Rise Apartment Zone, as set out in City of Edmonton, By-law No. 12800, Zoning Bylaw, s. 220; and,

(d) in failing to disclose, and provide the parties with an opportunity to respond to, the contents of the legal opinion it received outside of the hearing.

[18] The granting or denial of development permits can have important consequences for the rights of property owners and their neighbours. An appeal with leave is provided directly from a subdivision and development appeal board to the Court of Appeal, and given the nature of the issues, the rights engaged, and the relative expertise of the board, it has long been established that the standard of review on the interpretation of the *Act* and bylaws is correctness, although some deference is extended to other questions of law if the expertise of the board is engaged: ***Maduke v Leduc (County No. 25)***, 2010 ABCA 331 at paras. 5-6; ***Emeric Holdings Inc. v Edmonton (City)***, 2009 ABCA 65 at paras. 8-9, 448 AR 31, 3 Alta LR (5th) 1.

[19] The fairness of the proceedings is reviewed based on whether the proceedings met the level of fairness required by law: ***Armstrong v International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146***, 2010 ABCA 326 at para. 15, 35 Alta LR (5th) 238, 493 AR 259; ***Boardwalk Reit LLP v Edmonton (City of)***, 2008 ABCA 220 at para. 174, 91 Alta LR (4th) 1.

Jurisdiction to Consider Expiry of Development Permits

[20] Development permits are often made subject to specific conditions relating to the particular development, and they are also subject to general conditions and limitations set out in the Bylaw. One of the universally applicable conditions or limitations is that a development permit is only valid for one year, unless a building permit is obtained or construction commences.

[21] The Board concluded that it did not have the jurisdiction to consider whether a permit had expired. This would mean that there is no administrative appeal of such a decision, and a person affected would have to apply to the Court of Queen's Bench for suitable relief by way of judicial review.

[22] If the City took the position that a permit had expired, and construction continued, it is likely that a stop work order would issue under s. 645 of the *Act*. If the developer disagreed that the permit had expired, it could appeal that order under s. 685(1)(c). If the permit itself is subject to any condition, the developer can appeal that condition under s. 685(1)(b). Similarly, if the City took the position that the condition had not been satisfied, and work continued, a stop work order would likely issue, triggering an appeal right under s. 685(1)(c). So if the development permit was subject to a condition that something was to be done within a fixed period of time, and the City issued a stop work order because it believed the thing had not been done, an appeal could be taken. Further, if a stop work order was issued on the basis that the development permit had expired, an appeal would lie. The expiry of permits and conditions are therefore issues that the Board may have to consider from time to time.

[23] On the Board's interpretation there would, however, be a gap in the regulatory scheme. If the City took the view (as in this case) that the development permit was still in good standing, then no stop work order would ever issue. Any interested party who was of the view that the permit had expired (either for failure of a condition, or because of the passage of time) would have no appeal

remedy. The resulting gap is an undesirable result, which supports the argument that the words "an order, decision or development permit" in s. 685(2) should be given a wider meaning. On that basis, the conclusion of the City that a development permit was still in effect, or that the conditions in a development permit had in fact been complied with, would generate a right of appeal.

[24] One of the features of appeals to the Board is the short 14 day limitation. On the Board's interpretation, a stop work order following a ruling that a permit had expired would have to be appealed within 14 days, but a decision that a permit had not expired would be subject to a much longer limitation period under the judicial review regime. This would create an undesirable lack of symmetry in the system. It would also create uncertainty for developers who would not know in a timely fashion if their permits would be challenged.

[25] As counsel for the Board pointed out, the interpretation of the *Act*, in conjunction with the Bylaw, is not without difficulty. While s. 685(2) creates a right to appeal "an order, decision or development permit", s. 686(1)(b) only provides for a time limit for an appeal from "the notice of the issuance of the permit". It might also be difficult, in some cases, to determine if a decision has been made that a permit is in good standing, and if so to calculate when time begins to run. This is not the first time the courts have had to resolve gaps in the process: ***Coventry Homes Inc. v Beaumont (Town) Subdivision and Development Appeal Board***, 2001 ABCA 49 at paras. 26-35, 277 AR 278. These provisions must be interpreted harmoniously with the scheme and objects of the *Act*, recognizing that the Legislature did not intend illogical or incoherent interpretations, incompatible with those objects: ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 SCR 27 at para. 27; ***R. v Atchison***, 2006 ABCA 258 at paras. 9, 12, 67 Alta LR (4th) 221, 401 AR 198. Where there has been no clear decision that a permit is still in effect, resort to judicial review might still be necessary.

[26] It is difficult to see how the general purposes stated in s. 617 of the *Act* have any bearing on this issue of interpretation. The Board concluded that recognizing a right of appeal in the circumstances "would likely infringe on the rights of the proponent for the specific interests of the Community League", and would be "contrary to the purpose section of Part 17". Potential impact on rights must, however, be the consequence of any appeal. If an appeal is launched, by either party, the rights of all parties are engaged. Interested neighbours like the community league are specifically given a right of appeal in s. 685(2), which is a recognition that they have the right to assert their "specific interest" over those of the developer. Those appeal rights are supportive of, not inconsistent with the purposes of orderly and rational development set out in s. 617.

[27] A proper interpretation of the scope of the Board's jurisdiction should give consideration to the administrative structure as a whole. Considering the ongoing validity of a development permit engages similar issues to considering the suitability of conditions in a development permit, to considering the correctness of a stop work order issued if the permit expires, and other development issues. The shortened limitation period will provide consistency within the system, and greater certainty for developers. The Board erred in declining jurisdiction over this issue.

Expiry of Development Permits

[28] Since the Board declined jurisdiction, the response of this Court would usually be to refer the matter back for consideration. However, both the appellant and Niginan Housing Ventures encouraged the Court to provide answers to the issues of law involved, in order to avoid further appeals, expense, and delay.

[29] It has apparently long been the assumption that development permits expire one year after they are issued, not one year after all the conditions in the permit are satisfied. In this situation, the City decided that the one year period did not begin to run until the conditions had been satisfied. The appellant challenges that interpretation.

[30] The appellant relies on the plain wording of s. 22.1 of the Bylaw which states that a development permit "shall no longer be valid after one year from the date of approval of the permit". It argues that "date of approval" is clearly not "date of fulfillment of conditions". It pointed out that the interpretation adopted by the City would permit a developer to extend the life of a development permit indefinitely by simply refraining from complying with some minor condition.

[31] The City relies on s. 17.1 of the Bylaw which reads in part ". . . the Development Permit shall not be valid unless and until . . . any conditions of approval, save those of a continuing nature, have been fulfilled." The City argues that the permit is not "valid" until the conditions are met, and so it can not "no longer be valid" under s. 22.1 until it has become valid. Thus, the one year cannot begin to run until the conditions are met.

[32] On a plain reading of s. 22.1, the time for which a permit is valid begins to run "from the date of approval". The narrative style of the section does not create any ambiguity, and the phrase "shall no longer be valid" is essentially a synonym for "expires". The appellant's interpretation would encourage developers not to apply for permits prematurely, before they have considered and resolved any development issues that are likely to be raised. If the developer knows that there is only one year to comply with conditions, incomplete development applications will be discouraged. Further, as the appellant noted, it is undesirable to allow a developer to hold a permit open indefinitely by simply refraining from complying with some minor condition.

[33] Niginan Housing Ventures obtained its permit on May 5, 2008. Since no building permit was issued, and no construction had commenced, the permit expired one year later, on May 5, 2009.

Timeliness of the Appeal

[34] On January 17, 2011 the appellant filed its appeal with the Board. The Board held that the appeal was out of time insofar as it was an appeal from the permit itself. However, since the Board declined jurisdiction over whether the permit had expired, it never decided whether the appellant had filed a timely appeal with respect to the continuing currency of the permit.

[35] Section 686(1)(b) of the *Act* provides that an appeal must be filed within 14 days "after the date on which the notice of the issuance of the permit was given in accordance with the land-use bylaw". The Bylaw does not provide for any notice of decisions, other than decisions to issue a Class B permit. The problem of calculating the expiry of the appeal period in such cases has previously arisen in other contexts.

[36] In ***Coventry Homes*** an appeal was brought respecting a building permit for which no notice was required under the bylaw. ***Coventry Homes*** rejected the argument that there is no limit on the right to appeal when notice is not required. Rather, the Court interpreted the *Act* as stipulating that time begins to run when the interested party has actual notice of the development permit, or ought to have realized that a development permit had issued. It is fair and practical to apply the same rule in this appeal. The time to appeal should run from when the interested party knew, or should have known, that the City was taking the view that a development permit remained in effect, notwithstanding its *prima facie* expiry.

[37] In this appeal, the City stated unequivocally in its letter of January 7, 2011, that it was taking the position that the development permit was still in good standing. That is the latest possible day on which the appeal period could have started to run. The appellant's appeal was filed within 14 days of that date.

[38] Was there an earlier time when the appellant knew or ought to have known that the City took the view that the permit was still in good standing? Since the Board declined jurisdiction over the issue, it never resolved this point. While the Board decided that the appellant had constructive notice of the development permit in November of 2010, the Board never decided when the appellant had constructive notice that the City took the position that the permit was still in good standing.

[39] When there was constructive notice must be determined having regard to the entire context. When the appellant's president noted construction activity on the site in November of 2010, he was alerted to the possibility of a development permit. There is however no evidence on this record that the City had turned its mind to whether the permit was still in effect at that time. It appears that the November construction activity was taking place without a building permit, because the foundation permit was not issued until December 2, 2010. Even then it is not clear whether the foundation permit was issued as a matter of routine, or after considering the status of the earlier development permit.

[40] The development officer testified that in late November he spoke with Ms. Bubel, a representative of the appellant, and advised her that a development permit had been issued. Ms. Bubel confirmed this conversation, but said that she was told that "more research was required to determine whether or not the development permit was still valid". The appellant's president indicated that in his view activity on the site does not necessarily mean there is a valid development permit. He indicated that there was significant confusion about the status of the permit, that was not resolved until the letter of January 7, 2011. His letter of December 5, 2010 was written on the assumption that the development permit had expired, because it stated that the appellant wanted

notice "if the Planning Department chooses to re-issue a Development Permit". No one challenged the credibility of these witnesses. Their views were formed against the background of an existing interpretation that a development permit expires one year after it is issued.

[41] There is no evidence on the record of anything happening between the president's letter of December 5, 2010, and the City's response of January 7, 2011, that would have given the appellant actual or constructive notice that the City had determined that the development permit was still in good standing, notwithstanding that it was over two and a half years old. On this record it cannot be concluded that the appellant had actual or constructive notice prior to January 7, 2011.

Proper Characterization of the Development

[42] The Board did not consider if the development is Apartment Housing or Extended Medical Treatment Services. Given the conclusion on the expiry of the permit, this issue need not be considered further.

Disclosure of the Legal Opinion

[43] Generally the parties to a hearing are entitled to review all of the material considered by the tribunal. There is, however, an exception for legal opinions obtained by the tribunal. Those opinions are subject to solicitor and client privilege, and need not be produced: ***Pritchard v Ontario (Human Rights Commission)***, 2004 SCC 31, [2004] 1 SCR 809. After considering the need to maintain an appearance of neutrality, and in order to promote a fair and open hearing, the tribunal might well elect to waive the privilege and disclose legal opinions that do not impact on the privacy of its deliberations and other sensitive topics. But the tribunal cannot be compelled to disclose the opinion, and the failure to disclose the opinion does not itself amount to a breach of the rules of natural justice.

[44] The content of the legal opinion is not disclosed on the record. It is not, however, alleged by any party that the Board decided the appeal on a ground not previously argued. No party alleges that it was taken by surprise because it was not aware of the approach ultimately taken by the Board. It is not suggested that the Board relied on undisclosed laws, rules, policies or prior decisions. While the Board need not disclose privileged legal opinions, it must ensure that the parties have fair notice of the case they must meet. In this case the failure to disclose the legal opinion did not result in an unfair hearing. As in ***Pritchard*** at para. 31 ". . . the appellant was aware of the case to be met without production of the legal opinion".

Conclusion

[45] The appeal is allowed. The development permit expired one year after it was issued, on May 5, 2009.

[46] By way of postscript it is worth noting how unhelpful it was for the development officer not to give notice of this development permit to the appellant and other interested parties, even if it was a Class A permit. It was well known that this was a controversial development that was opposed by some people. The failure to give notice created great uncertainty on this file. It meant, even on the position taken by the respondents, that the appeal period on the development permit issued May 5, 2008 did not begin to run until over 2.5 years later in November 2010. While the Bylaw may not require notice of Class A permits, that does not mean that giving notice is not a good idea. As was pointed out in ***Coventry Homes*** at para. 32, one of the reasons for the short appeal period is to provide certainty to the developer. Failing to give notice of development permits that are obviously controversial helps no one.

Appeal heard on February 29, 2012

Reasons filed at Edmonton, Alberta
this 13th day of March, 2012

Slatter J.A.

I concur: Authorized to sign for: McDonald J.A.

I concur: Ross J.

Appearances:

J.A. Agrios, Q.C.
for the Appellant

A.N. Delgado
for the Respondent City of Edmonton

P.A.L. Smith, Q.C.
for the Respondent Subdivision and Development Appeal Board

K.L. Becker Brookes
for the Respondent Niginan Housing Ventures